Supreme Court, U.S.
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No. 03-47

In The Supreme Court of the United States

FRANK D. GILLIS, et al.,

Petitioners,

v.

JOHN HOLLAWELL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

There is no jurisdiction because the cases are moot. The state was denied a stay of the Third Circuit's judgment in *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), ordering reconsideration and a parole hearing within 45 days. The Parole Board held the parole hearing and refused Thomas parole on May 23, 2003. In *Hollawell v. Gillis*, the state did not attempt to obtain a stay of the Third Circuit's judgment ordering a re-adjudication of his parole application. On remand, on July 18, 2003 the district court ordered a decision on reconsideration within 90 days.

STATEMENT OF THE CASE

Louis Mickens-Thomas has been incarcerated since 1964 on a life sentence for a conviction of murder in the first degree. In 1995 Mr. Thomas received a commutation of his life sentence by the Governor of Pennsylvania after a unanimous recommendation from the Board of Pardons. At the time, he was 66 years old and had been incarcerated for 31 years on his murder conviction. The Pardons Board noted his sterling prison record, his attainment of a college degree, the therapeutic programs he had taken, and his extensive community support. App. Vol. II, 40-41.[1] "The Staff, Superintendent and Commissioner all support commutation due to the applicant's maturity and stability." App. Vol. II, 40.

[1] "App. Vol." refers to the record before the Third Circuit.

The commutation order made Mr. Thomas eligible for parole consideration in July of 1996. The Parole Board initially refused to consider him for parole. However, in response to a state court mandamus action, it conceded that it had unconstitutionally retroactively applied a new statute to his case. Pet. 10, n. 10; Pet. App. 66a. In 1997 and again in 1998 Mr. Thomas was refused parole. After exhausting state remedies (Pet. 10), Mr. Thomas filed a habeas corpus petition in federal district court alleging, among other grounds, that the retroactive application of the parole policy statute, 61 P.S. §331.1, as amended in 1996, violated his ex post facto rights. Extensive discovery was conducted to examine, in accordance with *Garner v. Jones*, 529 U.S. 244 (2000), the Parole Board's "policy statements, along with the Board's actual practices" to determine "whether, as a matter of fact, the amendment . . . created a significant risk of increased punishment." *Id.*, 529 U.S. at 256. The district court, considering the evidence from Mr. Thomas's file, statistical evidence, and the Board's statements explaining the import of the statute, before and after it was amended, concluded that Mr. Thomas's ex post facto rights were violated by the application of the amended statute, 61 P.S. §331.1, because it significantly decreased the opportunity for parole he would have had under the pre-1996 statute. Pet. App. 63a-77a.

The Third Circuit affirmed in a thorough, fact-intensive opinion. *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003) (Pet. App. 23a-60a). Mr. Thomas had no prison misconducts after being granted commutation, he had continued therapeutic programs, and he had maintained extensive community support and institutional recommendations for parole. Pet. App. 34a-37a. The Third

Circuit concluded after examining the Parole Board's practices and policies under the respective versions of 61 P.S. §331.1 that Mr. Thomas would have been paroled under the rehabilitative model of the statute in effect from 1941-1996, and that parole was denied because of the application of the 1996 amended statute which had a new public safety focus on eliminating any risk of reoffending. Pet. App. 27a-34a; 40a-49a; 55a-58a.

In support of the holding that Mr. Thomas had been significantly prejudiced by the application of the amended 1996 statute, the court of appeals pointed to the "quite staggering" statistical evidence that of 266 inmates with commuted life sentences in the history of Pennsylvania under the pre-amended parole statute "all were granted parole on the first or second application." Pet. App. 44a. Denials on a first application were because of post-commutation misconduct. Pet. App. 69a; App. Vol. III, 395-411. Mr. Thomas, with no post-commutation misconduct, now 75 years old, has been denied parole four times since 1997. The Third Circuit concluded: "[t]he Thomas application is distinguished from these 266 cases only by the intervening policy directive of 1996, emphasizing public safety." Pet. App. 44a.

After the Third Circuit ordered parole reconsideration for Mr. Thomas under applicable pre-1996 law and policies, the Parole Board sought a stay which was denied by that court on April 7, 2003. An application for reargument was also denied (Pet. App. 80a-81a) with no dissent. On

May 23, 2003, the Board, on reconsideration, refused parole again.[2]

John Hollawell was convicted of bribery and related offenses in Pennsylvania and sentenced to 6-1/2 – 23 years imprisonment in 1990. After he was refused parole on July 21, 1999 (Pet. App. 5a), he exhausted state remedies and filed a habeas corpus petition in federal district court. (Pet. 9a-11a). Mr. Hollawell raised the same ex post facto claim as Mr. Thomas concerning the application of the 1996 amended version of 61 P.S. §331.1 to his parole consideration. In a non-precedential opinion, he was granted habeas relief on the basis of the decision in *Mickens-Thomas*. Pet. App. 1a-16a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Decisions Below, Involving The Retroactive Application Of A Statute, Do Not Raise The Question Of Whether Internal Policies Are Laws.

The first question raised by Petitioners (Pet. I) is simply not presented by these cases. These cases "arise out of an amendment to Pennsylvania's parole statute." Pet. 3. The district court in *Mickens-Thomas* held that the retroactive application of the parole statute, 61 P.S. §331.1, as

[2] A motion to enforce the habeas corpus judgment, contending that the Parole Board's latest refusal did not comply with the Third Circuit's holding and the Ex Post Facto Clause, was denied by the Third Circuit on June 18, 2003 without prejudice. A motion to enforce the habeas corpus judgment was then filed in the district court, and is now pending.

amended in 1996, violated Mr. Thomas's ex post facto rights. Pet. App. 77a-80a. In accordance with *Garner v. Jones*, 529 U.S. 244, 256 (2000), the Third Circuit considered the practices and policies of the Parole Board under the former version of the statute, and under the 1996 amended version to determine whether there was an ex post facto violation. The Third Circuit affirmed, concluding that the amended statute provided a more onerous standard for parole (Pet. App. 39a-46a), and that the retroactive application of the amended 1996 statute seriously disadvantaged parole chances for Mr. Thomas and violated his ex post facto rights. Pet. App. 46a-58a.

"Like Mickens-Thomas, Hollawell based his claim on the amendment to Section 331.1 of the Parole Act." Pet. 16. The Third Circuit's non-precedential decision in *Hollawell* followed the *Mickens-Thomas* "holding that the statutory change did constitute an Ex Post Facto violation with respect to an individual already sentenced." Pet. App. 12a.

The Parole Board does not contest the settled proposition that a statute is a law for ex post facto purposes. And, since this case was decided below on the basis of a change in the statutory law on parole, the asserted conflict between courts of appeals on the question of whether internal policies are laws for ex post facto purposes is quite beside the point. None of the cases relied on by the state (Pet. 19-22) were discussed in the decisions below because they do not involve the retroactive application of a statute. To the contrary, these cases involve changes in internal policies or regulations. Here, entirely consistent with this Court's decision in *Garner v. Jones*, the policies and practices of the Board were considered only as a matter of context in determining "whether, as a matter of fact, the

[statutory] amendment . . . created a significant risk of increased punishment." *Garner v. Jones*, *supra*, 529 U.S. at 256.

2. There Is No Conflict With Precedential Decisions of the Supreme Court of Pennsylvania.

It is clear that "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." *Garner v. Jones*, *supra*, 529 U.S. at 253. Pennsylvania law, contrary to the claims of the state, also recognizes that there is no "unfettered discretion" to deny parole. *See* Pet. 25. "Absent a change in the statutes governing parole, . . . denial of parole would generally constitute a discretionary matter that is not subject to review." *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa. 2001). Where, as here, there has been a change in the statutes governing parole, "an action for mandamus remains viable as a means for examining whether statutory requirements have been altered in a manner that violates the ex post facto clause." *Id. See also*, *Poindexter v. Pennsylvania Board of Probation and Parole*, 798 A.2d 1276 (Pa. 2002) (per curiam).

The state asserts that the decision in *Winkelspecht v. Pennsylvania Board of Probation and Parole*, 813 A.2d 688 (Pa. 2002), creates a conflict with the decisions of the Third Circuit finding an ex post facto violation in the retroactive application of the amended parole statute, 61 P.S. §331.1. However, as the state recognizes, the lead opinion in *Winkelspecht*, finding no ex post facto violation, on behalf of three members of the Court, is a plurality opinion. Pet. 25. Plurality opinions have no precedential value in Pennsylvania. *E.g.*, *Hoy v. Angelone*, 720 A.2d 745, 750 (Pa. 1998); *In the Interest of O.A.*, 717 A.2d 490,

496 n.4 (Pa. 1998); *In re Reyes*, 381 A.2d 865, 871 (Pa. 1977).

The concurring and dissenting opinion by Justice Saylor, which is the dispositive opinion in this case, denies ex post facto relief because Winkelspecht presented *no* evidence in support of his ex post facto claim. The holding was limited to a finding that "there is no facial violation of the Ex Post Facto Clause." *Winkelspecht*, 813 A.2d at 697. Relying on the framework for ex post facto analysis established by this Court (813 A.2d at 695-97), Justice Saylor concluded that the claim must fail because "Petitioner has failed to adduce *any* such evidence" establishing that the statutory amendment was likely to enhance punishment. 813 A.2d at 697. (Emphasis added). However, Justice Saylor expressly recognized that an ex post facto violation could be established if a prisoner presented "some evidence of a systemic change in the rate at which the Board grants parole, or other proof regarding changes in parole frequency following the 1996 [statutory] amendment." *Id.* at 697. *Winkelspecht* preceded the decision in *Mickens-Thomas* which, based upon the band of evidence referenced by Justice Saylor analyzed the actual practices and policies of the Parole Board with respect to the pre-amended version of 61 P.S. §331.1, and the post-1996 statute.

Moreover, as the court of appeals noted, this case is exceptional in that respondent Thomas was part of a special sub-class of parole applicants – persons whose life sentences had been commuted to make them eligible for parole. As discussed above, respondent Thomas is the *only* such inmate of the almost 300 lifers with commuted sentences in Pennsylvania over the past 50 years who has

not been paroled. It is difficult to imagine more compelling evidence of a systemic change in parole.

A majority of the Pennsylvania Supreme Court may choose to follow *Mickens-Thomas*[3] or reach the same conclusion independently in a case, which unlike *Winkelspecht*, involves an evidentiary record and not merely a facial challenge. There is no conflict warranting review by this Court.

3. This Case Involves Only A Thorough, Fact-Intensive Analysis Correctly Applying Decisions Of This Court.

The court of appeals correctly applied this Court's ex post facto cases in a comprehensive and fact intensive decision. The state makes no claim that the Third Circuit ex post facto ruling in *Mickens-Thomas* is in conflict with this Court's decisions analyzing ex post facto claims in the parole and early release context. *See, e.g., Garner v. Jones*, 529 U.S. 244 (2000); *Lynce v. Mathis*, 519 U.S. 433 (1997); *California Department of Corrections v. Morales*, 514 U.S. 499 (1995). Indeed, *Garner* mandates the mode of analysis employed by the Third Circuit: an examination of the Parole Board's policies and practices to determine "whether, as a matter of fact" the statutory amendment has "created a significant risk of increased punishment." *Garner*, 529 U.S. at 256. The state's complaint is with the result reached by the court below.

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[3] The non-precedential decision in *Hollawell* depended on the "factual evidence of the amendment's practical effect" developed in *Mickens-Thomas* in applying the holding of that case. Pet. App. 16a.

The state appears to argue that the *Mickens-Thomas* decision incorrectly concluded that the statutory amendment to 61 P.S. §331.1 altered the standards for determining parole eligibility and made it significantly more difficult to obtain release. Pet. 8, 12 (Statement of Facts). However, both Pennsylvania intermediate appellate courts and the Parole Board have concluded (even before the decision in *Mickens-Thomas*) that the amendment to 61 P.S. §331.1 had made it dramatically more difficult for offenders convicted of violent crimes to obtain parole. *See, e.g., Voss v. Pennsylvania Board of Probation and Parole*, 788 A.2d 1107, 1111 (Pa. Cmwlth. 2001); *Stewart v. Pennsylvania Board of Probation and Parole*, 714 A.2d 502, 508 (Pa. Cmwlth. 1998). The Third Circuit's conclusion after a review of an extensive record is the kind of fact bound analysis that is not suitable for a grant of certiorari.

Review is also inappropriate in the *Mickens-Thomas* case because of unique and dispositive circumstances. Mr. Thomas is the only person in the history of Pennsylvania to be denied parole after having his life sentence commuted to make him eligible for parole consideration. Unlike other inmates who become eligible for parole after serving a judicially imposed minimum sentence, a lifer receives a minimum sentence and parole eligibility only after a complete investigation, public hearing, recommendation from the Pardons Board and approval by the Governor. *See* Article IV, §9, Pa. Const.; App. Vol. II, 40-42. The conclusion that the application of the amended 1996 parole statute had a negative impact on Mr. Thomas's parole chances was bolstered by the "staggering statistics" that between 1941 and 1996 every one of 266 commuted lifers had been paroled under circumstances no different from those presented here. Pet. App. 44a.

There was ample evidence to support a finding of an ex post facto violation in *Mickens-Thomas*. Moreover, that decision is of limited applicability given the unique and extraordinary circumstances of his case. *See* Pet. App. 69A-70a.[4]

4. Review Should Be Denied Because Of Mootness.

"Mootness is a jurisdictional question [under Article III] because the Court is not empowered to decide moot questions or abstract propositions." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). The state seeks an advisory opinion in the *Mickens-Thomas* case because there is no meaningful relief which this Court can now award. The Parole Board was denied a stay by the Third Circuit of its order to hold a parole hearing under applicable law within 45 days. It held the hearing and refused Mr. Thomas parole on May 23, 2003.

Because the Parole Board has refused parole, there is no meaningful relief this Court can grant to the Parole Board.[5] *See and compare Calderon v. Moore*, 518 U.S. 149

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[4] In the non-precedential opinion of *Gillis v. Hollawell*, relying on the extensive record of *Mickens-Thomas*, the Third Circuit found an ex post facto violation in the retroactive application of the statute in a case not involving a lifer with a commuted sentence. The non-precedential decision in *Gillis v. Hollawell* is not binding on any court, including other panels of the Third Circuit. Third Circuit IOP §§5.3, 9.1.

[5] The latest parole refusal of May 23, 2003 is now being challenged as a violation of the Third Circuit's order and the Ex Post Facto Clause in a pending Motion To Enforce Habeas Judgment in the district court. It is entirely speculative whether Mickens-Thomas will prevail on his motion requesting an order for parole. "Such speculative contingencies afford no basis for our passing on the substantive issues (the petitioner)

(Continued on following page)

(1996) (per curiam) (where habeas court ordered new trial, and scheduling process for new trial had begun, case not moot because new trial had not occurred). Consistent with past decisions of this Court where review has been denied when the litigant seeking review cannot be given any meaningful relief because of circumstances that developed after the initiation of litigation, certiorari should be denied here on mootness grounds. *See, e.g., Spencer v. Kemna*, 523 U.S. 1 (1998) (challenge to parole revocation mooted by expiration of sentence); *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) (individual challenge to refusal to release on parole mooted after release from prison); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (challenge to law school admissions policies by student mooted by fact that his graduation from that law school was imminent); *North Carolina v. Rice*, 404 U.S. 244 (1971) (per curiam) (challenge to sentence became moot when it was fully served during course of litigation).[6]

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would have us decide." *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1974), quoting *Hall v. Beals*, 396 U.S. 45, 49 (1969). In the event of such an outcome, a new order would be appealable to the Third Circuit and this Court by way of certiorari.

[6] *Hollawell* a non-precedential decision, has been joined with the *Mickens-Thomas* case in the request for certiorari.

CONCLUSION

Wherefore, for these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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